In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-933

SECOND NATIONAL BANK OF NORTH MIAMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a commercial bank, issued money orders to one of its customers, which in turn delivered them to the Internal Revenue Service in payment of its employment taxes. Thereafter, petitioner refused to honor the money orders when presented for payment. The sole issue raised by the petition is whether the decision below correctly held that the government was a holder in due course with respect to the money orders under Florida law and that the Internal Revenue Service properly imposed a lien on petitioner's assets in the amount of the unpaid money orders, pursuant to Section 6311(b)(2) of the Internal Revenue Code of 1954.

On October 14, 1970, petitioner issued 190 blank-payee money orders totalling $92,355,86 to one of its customers, Medallion Electric Company, Inc., an electrical subcontractor which was working under the Hannan Company, a general contractor, in the construction of a shopping

center. The money orders had been issued to Medallion after a deposit to its payroll account of a check drawn by Hannan payable to Medallion and petitioner. However, instead of meeting its payroll with the money orders, Medallion delivered the money orders to the Internal Revenue Service in payment of its employment taxes. Subsequently, when Hannan learned that Medallion's emloyees had not been paid with the money orders, Hannan stopped payment on its check. When the money orders were presented for payment by the Internal Revenue Service, petitioner refused to honor them. The United States thereafter brought this suit to collect the amount of the money orders and to secure enforcement of a lien on petitioner's assets to protect its right to payment from petitioner (Pet. App. 10a-13a).

The district court concluded that under Florida law the United States was a holder in due course with respect to the money orders and thereby rejected petitioner's claimed defenses of failure of consideration and misrepresentation by Medallion. The district court also enforced the lien on petitioner's assets imposed by Section 6311(b)(2) of the Internal Revenue Code of 1954. The court of appeals affirmed (Pet. App. 5a-35a).

1. Section 6311(a) of the Internal Revenue Code of 1954 provides that it shall be lawful for the Internal Revenue Service to receive checks in payment of taxes. However, in the event a certified check or any money order used in payment of taxes is not paid by the drawee bank, Section 6311(b)(2) grants the United States, in addition to its right to obtain payment from the taxpayer, a lien for the amount of the check or money order upon all the assets of the drawee bank.

As the court of appeals pointed out (Pet. App. 27a-31a), petitioner had no right to refuse payment on the money orders, because the United States was a holder in

due course with respect to them under Florida law.[1] In so concluding, that court held that there was ample evidence to support the factual findings made by the district court that petitioner's defenses of failure of consideration and fraud by Medallion or the United States were without merit.

Nevertheless, petitioner again challenges (Pet. 14-18) the correctness of those findings.[2] In its view, there was a failure of consideration when Hannan stopped payment on its check to Medallion upon the strength of which petitioner issued its money orders. However, at the time the United States received the money orders, it had no notice of Hannan's stop payment order because Hannan did not stop payment on its check until after the money orders were delivered to the Internal Revenue Service. Moreover, there is no evidence showing that the Internal Revenue Service agents knew that the money orders had been issued by petitioner prior to collection of Hannan's check. Indeed, as petitioner acknowl-

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[1]Section 673.3-302 of the Uniform Commercial Code, Fla. Stat. Ann., defines a holder in due course as follows:

Holder in due course:

(1) A holder in due course is a holder who takes the instrument:

(a) For value; and
(b) In good faith; and
(c) Without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

* * * * *

[2]Contrary to petitioner's contention (Pet. 14-15), the court of appeals did not treat the district court's determination that the United States was a "holder in due course " as a purely factual matter, but, instead, noted the mixed legal and factual questions generally involved in such an issue (Pet. App. 29a). However, here only factual issues relating to notice and good faith were raised by petitioner (Pet. App. 27a-31a), to which the court of appeals properly applied the "clearly erroneous" standard of review of Rule 52(a) of the Federal Rules of Civil Procedure.

edged below (I-R. 186-187),[3] it is the custom in the banking trade not to issue money orders on uncollected funds. Finally, even if the revenue agents knew that petitioner issued the money orders on uncollected funds, they had no reason to believe the delivery of the money orders to the Internal Revenue Service would result in Hannan's stopping payment on its check since Medallion's representative informed them that the funds received from Hannan represented amounts due Medallion on accounts receivable and did not represent advances for payroll purposes (I-R. 129, 135).

Similarly, petitioner's contention (Pet. 18-20) that the Internal Revenue Service "called upon" and "directed" Medallion to "procure" the money orders by "deceit" and to deliver them to the Internal Revenue Service is without merit. The evidence showed that Medallion initiated the meeting at which time it indicated to the Internal Revenue Service it was having trouble meeting its employment tax obligations, and that it was Medallion itself that suggested using the money orders to pay its taxes (I-R. 136, 151). The record does not support petitioner's contention that the United States directed a plan to defraud petitioner.[4]

2. Petitioner further argues (Pet. 21-23) that the courts below erred in enforcing a lien on all of its assets in the amount of the unpaid money orders pursuant to Section 6311(b)(2) of the Code. Contrary to petitioner's repeated allegations of fraud on the part of

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[3]"I-R. refers to Volume One of the record appendix filed in the court of appeals.

[4]Contrary to petitioner's contention (Pet. 19), an absence of good faith cannot be inferred from the fact that Medallion used the money orders to pay its withholding taxes rather than its employees. Withheld taxes are held by the employer as a special fund in trust for the United States and may not be used for other corporate purposes including the payment of employee salaries. See 26 U.S.C. 7501; *Liddon* v. *United States*, 448 F. 2d 509, 513 (C.A.5), certiorari denied, 406 U.S. 918.

Medallion and the Internal Revenue Service, the lien provisions of Section 6311(b)(2) have been applied here for the sole purpose of protecting the rights of the United States and enforcing the otherwise existing obligation of petitioner to pay to a holder in due course the face amount of money orders it issued. Although petitioner is not the taxpayer, the lien exists against its assets because the money orders it issued represent an independent and unconditional obligation of the bank. *State of Pa.* v. *Curtiss Nat. Bank of Miami Springs, Fla.*, 427 F.2d 395 (C.A. 5); *United States* v. *Milton*, 382 F.2d 976 (C.A. 6), certiorari denied, 390 U.S. 952. In effect, the holder of a bank's money orders, the United States in this case, becomes a creditor of the bank and the lien imposed by Section 6311(b)(2) merely serves to protect this interest.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.